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In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 87

GEORGE M. NAPIER, Attorney General of the State of Georgia,
Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEE

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

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PART I

STATEMENT OF THE CASE.

The State of Georgia adopted an Act approved on the 13th day of August, 1924 (Georgia Laws, 1924, page 173), which is set out in full at page 9 of the record. The purpose of the Georgia law was to require "all steam railroad companies, operating steam locomotive engines on its railroad or railroads in

or through the State of Georgia, to provide and equip each and every steam locomotive so operated over its said road or roads in Georgia, with an automatic door to the fire box of such locomotive engine and to provide how the same shall be constructed and operated, and to provide a penalty against the company which fails to provide and maintain such automatic fire box doors in good condition."

There was exempted from the Act "locomotive engines weighing less than one hundred twenty-five thousand (125,000) pounds on the driver, or less than twenty-one (21) inch cylinders on logging or tram roads or mechanically fired engines."

The Atlantic Coast Line, which is an interstate carrier by railroad having considerable mileage in Georgia, filed its bill in the District Court of the United States for the Northern District of Georgia against the Attorney General of Georgia and against the prosecuting officers of the various jurisdictions along its line in Georgia, challenging the Georgia Act as being invalid and unconstitutional in that it offended against the commerce clause of the federal constitution. It contended that Congress had so occupied the field sought to be covered by the state Act as to render the statute unconstitutional as an interference with interstate commerce. In particular it insisted that jurisdiction of the subject had been taken by the Congress of the United States under the Act of February 17, 1911, and the two amendments thereto of March 4, 1915, and June 7, 1924.

The opinion of the District Court sustaining appellee is found on pages 15, 16 and 17 of the record. The opinion was followed by a judgment and decree declaring the Georgia Act invalid and enjoining the defendants named in the bill from applying or enforcing it.

THE QUESTION INVOLVED

The precise point to be determined is this:

Has Congress so taken jurisdiction over the subject of the locomotive and boiler of a carrier by railroad in interstate commerce as to deprive the state from enacting legislation requiring a carrier by railroad operating in interstate commerce within its borders to install an automatic door to the fire box of the locomotive?

THE APPLICABLE FEDERAL STATUTES

The pertinent Acts of Congress are as follows:

1. The Act of February 17, 1911, Ch. 103, 36 Stat. L. 913;
2. The Act of March 4, 1915, Ch. 169, 38 Stat. L. 1192, which is an amendment to the Acts of February 17, 1911; and
3. The Act of June 7, 1924, Ch. 355, 43 Stat. L. 659, which again amended the Act of February 17, 1911.

The caption of the Act of February 17, 1911, is:

> "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

The first section of this Act defines the carriers to which it is applicable.

The second section makes it unlawful, after the 1st day of July, 1911, for any common carrier, subject to the Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic, unless the boiler of said locomotive and the appurtenances thereof "are in proper condition and safe to operate in the service to which the same is put."

The third section provides for a chief inspector and certain assistants. They are required to make inspections and to "see

that the requirements of this Act and the rules, regulations and instructions made or given hereunder are observed by common carriers subject hereto."

The fourth section is administrative, dealing with the division of the country into inspection districts and dealing with the status of the inspectors.

Section five requires that each carrier subject to the Act shall file its rules or instructions for the inspection of locomotive boilers with the chief inspector, and that after hearing by the Interstate Commerce Commission, such rules and instructions with such modification as the Commission requires, shall become obligatory upon such carrier. If no such rules are filed, the chief inspector is required to prepare rules and instructions not inconsistent with the Act, and such rules and instructions, being approved by the Interstate Commerce Commission, and copy thereof being served upon the president, general manager or general superintendent of such carrier, shall be obligatory, and violation thereof shall be punished.

Section six of the Act requires that:

> "It shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work.
>
> "His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service."

Elaborate provision is made for carrying this power into effect.

Section seven requires annual reports to the Interstate Commerce Commission by the chief inspector, with recommendations.

Section eight requires reports of accidents.

Section nine provides a penalty upon any carrier for violating said Act or any rule or regulation made under its provisions or any lawful order of any inspector.

Section ten provides for an appropriation for carrying out the Act.

The Act of March 4, 1915, provides in Section 1 thereof that the Act of February 17, 1911, (designating such act by its date of approval and by its title or caption) "shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof."

Section two provides:

> "That the chief inspector and the two assistant chief inspectors, together with all the district inspectors, appointed under the Act of February seventeenth, nineteen hundred and eleven, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said Act of February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. That upon the passage of this Act all inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed by this Act."

By section two of the Act of June 7, 1924, Congress amended the second section of the Act of February 17, 1911, to read thus:

"Sec. 2. That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

PART II

THE ARGUMENT AND BRIEF OF AUTHORITIES

The constitutional right given to Congress to regulate commerce between the states is broad enough to include the right to regulate interstate commerce in all of its phases and aspects and extends to every instrumentality or agency by which it is carried on.

McCulloch vs. Maryland, 4 Wheat 316.

Smith vs. Alabama, 124 U. S. 465.

Congress has, therefore, by these three Acts, sought to regulate interstate commerce by legislation concerning an instrumentality thereof. The State of Georgia has likewise enacted legislation touching the same instrumentality. The same field is being occupied by both the national and the state governments, and it is manifest that the paramount authority of the former must prevail.

It must be clear that the determining factor involved is whether the Georgia statute and the Acts of Congress do in

fact occupy the same field. If that premise is assumed the well settled applicable doctrines announced many times by this court control the issue against the appellant. Let us, then, examine this controlling law as clarified by repeated decisions.

Obviously the Georgia statute under attack must find its sanction, if it finds any at all, in the power of the state to pass laws in the interest of the health, safety, morals and general welfare of its citizens, even though such laws affect, incidentally, interstate commerce. In other words, the act must be one enacted under the police power of the state. The statute cannot stand as a regulation of interstate commerce even in the absence of any action whatever by Congress, for this is a subject which by the commerce clause of the Constitution has been given to the federal government for exclusive regulation, and that delegation of power in and of itself necessarily excludes the states from direct control of the subject.

Minnesota Rate Cases, 230 U. S. 352.

Southern Ry. Co. vs. Reid, 222 U. S. 424.

But when Congress has acted to regulate commerce the state is silenced, even though the state law be a police measure conducive to the welfare or convenience of its citizens. Thus in:

Erie Railroad Co. vs. New York, 233 U. S. 671,

it was said:

> "Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist. . . . and we considered it elementary that the police power of the State could only exist from the silence of Congress upon the subject and ceased when Congress acted or manifested its purpose to call into play its exclusive power."

In the recent case of:

Oregon-Washington R. R. & Nav. Co. vs. Washington, decided by this court March 1, 1926, and found in the Advance Opinions of the Supreme Court for March 15, 1926, 70 L. ed. 332, the Chief Justice tersely put the rule in these words:

> "In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action."

See also:

Northern Pacific Ry. Co. vs. Washington, 222 U. S. 370;

Southern Ry. Co. vs. Indiana, 236 U. S. 439;

Adams Express Co. vs. Croninger, 226 U. S. 491.

And this silence must be complete. It does not rest with the state to supplement the act of Congress any more than it may vary or take away therefrom.

Quoting again from *Erie Railroad Company vs. New York*, supra:

> "It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.
>
> "Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'Hours of Service' law of March 4, 1907, is the judgment of Congress of the extent of the restric-

tion necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it." . . .

See also: *Pennsylvania Railroad Co. vs. Commission*, 250 U. S. 566.

The test to be applied, therefore, is whether Congress has "pre-empted or occupied the field" of legislation on the subject of locomotives and all their parts and appurtenances when used in interstate commerce.

Turn now for a closer inspection and analysis of the Federal statute and its amendments.

THE SCOPE OF THE ACTS OF CONGRESS

The entire scheme, scope and purpose of the Congressional Act must be considered in seeking to determine whether it supersedes the state law, and "that which needs must be implied is of no less force than that which is expressed." In

Savage vs. Jones, 225 U. S. 501,

this court said (page 533):

"For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished —if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect— the state law must yield to the regulation of Congress within the sphere of its delegated power."

The court cites *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, and the cases of *Northern Pacific Ry. Co. vs. Washington*, and *Southern Ry. Co. vs. Reid*, both cited supra.

What then is the "scheme, scope and purpose" of these several Federal Statutes? By the original act of February 17, 1911, Congress very evidently was undertaking to insure the use of locomotive boilers and boiler appurtenances which were safe to operate. The carriers affected were to be held responsible for the safety of the boilers as well as their condition. Rules and instructions for inspection of the boilers both as to safety and proper condition might be initiated by the carriers, subject to approval by the Interstate Commerce Commission and machinery was provided by which the inspectors appointed under authority of the act might perform their duties of determining whether in point of fact the boilers were safe and in proper condition.

It will be observed that one of the two primary purposes sought to be accomplished by the act was to insure a *safe* boiler. The other purpose was to insure the "proper condition" of the boiler. Even if we give to this second expression the limited and restricted meaning of a requirement that the boiler and appurtenances shall be free from mechanical defects, very clearly the requirement of a *safe* boiler is of much broader significance. The carrier must use a *safe* boiler on its locomotives. Not only shall the boiler be free from physical defects and faulty material, but it shall be *safe* in all particulars, which clearly embraces the requirement that over and above faulty and defective parts there shall be on each locomotive a boiler equipped with all devices and appliances which assure its safety. The statute compels a safe boiler not only in installation and maintenance of sound parts but in the broader sense of compelling the installation of such parts as achieve safety.

The Act is clearly not merely an inspection act—one designed solely for the purpose of having the boilers tested by government representatives for defects. The scheme of the

statute evidently embraces this and more. The several parts may be in quite acceptable condition and yet the boiler, by reason of the failure of its equipment to include certain instruments, devices, or appliances for safety, may be deemed unsafe, and within the condemnation of the statute.

But who is to determine the safety of the boiler and what is the method by which safety is to be accomplished? To the carrier is given, in the first instance, the right to promulgate rules and instructions for the inspection of its locomotive boilers, but these rules and instructions must be approved by the Interstate Commerce Commission which may modify them. Section 5 of the Act of February 17, 1911. It is argued by the appellant that this shows that the statute is one which is limited in operation to an inspection and approval of the boiler or locomotive by the federal inspectors after the carrier had itself inspected it and offered it as one which it proposed to operate. This argument stresses the phrase that "each carrier . . . shall file its rules and regulations for the inspection of locomotive boilers with the chief inspector," provided for in the act. But by unduly emphasizing this clause the argument ignores the plain scope and extent of the statute. The boiler must be safe. Whatever is necessary to this end must be done. Inspection by carrier and federal officer alike is but a process in insuring safety—is but a step towards the end.

In section two of the original Act is found the positive requirement of safety of all locomotive boilers so that when engaged in interstate transportation service they may be employed "without unnecessary peril to life or limb." To be assured of this safety, inspection is considered necessary, and hence this language immediately follows that quoted above:

> "and all boilers shall be inspected from time to time in accordance with the provisions of this act,"

and when inspected they shall:

> "be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

See also the second section of both amendments.

The title of the Act defines its spirit and purpose, which is the "compelling of common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." There is no attempt here to aid in the interpretation of an ambiguity in the body of the statute by resort to the title. It is rather the realization, in the body of the Act, of the purpose stated in the title. This court in dealing with the Safety Appliance Acts authorized such a use of the Acts' titles. Thus in the third syllabus in

Southern Ry. Co. vs. Crockett, 234 U. S. 725,

is found this language:

> "This court has heretofore construed the letter of the Safety Appliance Act in the light of its spirit and purpose as indicated by the title no less than by the enacting clauses and that guiding principle should be adhered to."

THE EFFECT OF THE AMENDMENTS OF 1915 AND 1924.

By the two amendments of 1915 and 1924 this purpose of the 1911 Act was broadened into compelling not only a safe boiler, but a safe locomotive and tender in all their parts and appurtenances. By the amendments Congress elected to accomplish the safety not only of locomotive boilers but of the entire locomotive. It extended its jurisdiction to the locomotive in as full a measure as it had previously exercised it as to the boiler alone.

THE RULES PROMULGATED AND IN FORCE.

If to insure safe and suitable boilers Congress could order designated appliances and devices installed in connection therewith, Congress, by the amendments, assumed the same right and authority over the locomotive as a whole. Through the instrumentality of the Interstate Commerce Commission the federal government has exercised this power and has required the installation of a steam gauge (Rule 28); at least two safety valves (Rule 34); at least one water glass and three gauge cocks (Rule 37); two valves or shutoff cocks on the water glass (Rule 38); shields on all water and lubricator glasses (Rule 41); a lamp with all water glasses (Rule 42); ash pans (Rule 105); cylinder cocks (Rule 119); sanding apparatus (Rule 120); whistle (Rule 121); safety bars (Rule 122 b); headlights with designated intensity and devices (Rule 130) and classification lamps and cab lights (Rules 130 and 131).

As the court below pointed out the requirement of the installation of these things by the Commission "is a practical construction by it of its powers entitled to some weight."

The appellant recognizes that the Commission has ordered the installation of certain equipment by the mandatory term "shall have," but argues that the Commission has ordered the carriers to equip their locomotives only with such safety devices and appliances concerning the necessity for which men may not differ. This argument appears to concede the power of the Commission under the Act to order the carriers to equip their locomotives with recognized safety devices or instrumentalties. But the moment this is conceded the limitation of the federal statute to a mere inspection act disappears and the true spirit of the enactment stands forth as one which would compel a safe locomotive in all its parts, accomplishing this purpose not alone by inspection but by any orders di-

rected to that end. Appellant's argument is that while the Commission may have the power to require installation of certain equipment to render the locomotive safe to operate, nevertheless, its authority in this respect is limited to such items as to the necessity of which there can be no debate. Should there be a question about the essentiality of the device to insure safety, the Commission is without authority to require it. But it is conceded that the Act contemplates a required "standard of safety." Who but the Commission is to determine when this "standard of safety" is reached or what constitutes it? And if this duty is reposed in the Commission is it not encumbent upon it to determine what is and what is not essential? If the determination of the question is for the Commission, then, obviously, it may pass upon the advisability of ordering locomotives equipped with this or that appliance which in the judgment of the Commission is "essential to safety." And if it has the power to order a headlight installed as essential safety equipment, can it not order the installation of automatic doors to the fire box? Plainly the debatable necessity for the device is not the criterion by which to measure the power.

Congress never intended that the power of the Commission under the Act and its amendments should be only negative in character and be confined and narrowed to approving or condemning what the carrier might submit as a safe locomotive. Clearly the Commission is given the right to define a safe locomotive. Can it be that in such a definition it must restrict itself to negative terms and is denied the power to make *positive* requirements? Assume that it should determine that a locomotive is not safe to operate unless it have a sanding apparatus. Is there any real difference in an order requiring the installation of such a device, on the one hand, and on the other, an order that if a locomotive is found without a sanding ap-

paratus it shall be deemed unsafe to operate? Appellant admits this right to condemn and reject but denies the right to require by positive order that which promotes safety. Of course there is no distinction except that which may be found in a mere juggling of words. But the appellant to support his argument must find a real difference, because if the right exists to require, by positive order, the use of a sanding apparatus, quite obviously there must co-exist the right and power to require automatic fire box doors, and this, in turn, concedes that Congress has taken jurisdiction over the subject of automatic fire box doors to the utter exclusion of the state.

It is no answer to say that the Commission's power is limited to ordering the locomotive out of service unless it is deemed safe. There is no power in either the Commission or Congress to require the carrier to use any locomotive. At any time the carrier may retire the locomotive. There is no compelling power to force its use. But when it is used, or use of it sought, it must meet the Commission's safety definition. In this definition may be included positive as well as negative requirements.

It must be clear, then, that Congress through the Acts of 1911, 1915 and 1924 has occupied the entire field of the safety of the locomotive used in interstate commerce. There is no occasion for division of the subject-matter. The federal Acts are not mere inspection laws by which the locomotives of carriers are inspected and condemned if found unfit for service. Congress has required a safe locomotive and established the Interstate Commerce Commission as the agency to prescribe by regulation what shall be deemed a safe locomotive. Rules and regulations have been established and when measured by them the locomotive is either safe or unsafe. If safe, it may operate. If unsafe, it is unlawful for it to operate. The Georgia statute, by its terms, invades this field. It supplements

the federal legislation by requiring an automatic door on the fire box of locomotives engaged in interstate commerce. The federal laws and regulations have not seen fit to exact this equipment. Other devices which the Commission, acting under the manifest scope of the congressional legislation, considered essential to safety, have been required, but an automatic door to the fire box is not among the list.

THE SILENCE OF THE RULES AND REGULATIONS ON THE SUBJECT OF AUTOMATIC FIRE BOX DOORS.

The argument up to this point has addressed itself to showing that Congress has taken over the entire field involved in the safety of the locomotive in interstate commerce. We come now to consider the point raised by the appellant that in the absence of federal regulation the state may act.

It is contended that even if the Commission did have power, under the act, to require automatic doors to the fire boxes, it has not exercised it, and that the field is thus left open for such legislation as the state may see fit to pass and that this legislation is valid until the Commission shall have spoken.

It must be observed that in taking this position appellant assumes that Congress has acted and has taken jurisdiction of the subject; that it has left to the Commission the matter of passing such regulations as will carry into effect the purpose which Congress sought to accomplish; but it is urged that the regulations of the Commission being silent upon the subject the state may regulate.

This court has had this same argument presented to it in several cases and has uniformly ruled against the contentions of appellant.

In *Southern Ry. Co. vs. Indiana*, 236 U. S. 439, Mr. Justice Lamar quoted with approval the following language from *Prigg vs. Pennsylvania*, 16 Pet. 539, 617:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it . . . the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

We have heretofore had occasion to refer to the late and controlling case of *Oregon-Washington R. R. & Nav. Co. vs. Washington*, supra. In that case the Director of Agriculture of the State of Washington promulgated quarantine regulations against described areas in adjoining states by which the importation from those areas of alfalfa hay and meal into the state of Washington was forbidden except under named conditions. In passing these regulations the state Director of Agriculture was acting under a statute of the State of Washington which granted him the power. The validity of the Washington law and the quarantine order of the state officer were objected to on the ground that the United States government had exercised its paramount authority over the subject and had assumed control thereof. The State of Washington stressed the point that even though it was conceded that Congress had assumed control of the horticulture and agriculture of the states and had given to the Secretary of Agriculture of the United States the control thereof, yet, as this official had not seen fit to act, it was left open for the state to act, and its legislation was valid until such time as the Secretary of Agri-

culture should speak. In disposing of this contention the court said:

> "It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that cannot be given to the Federal statute. The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, state action is illegal and unwarranted."

With the whole field occupied by Congress silence upon a phase of the subject is itself a regulation. It is the equivalent of a determination that no action is needed. There is no necessity to pass a rule couched in negative terms. Failure to pass any rule or order at all brings about that result. The state has no more power to change such a rule of silence than it has to modify or repeal a positive command issued under the sanction of the paramount authority within the field.

PREVIOUS DECISIONS OF THIS COURT DEALING WITH THE ACT OF FEBRUARY 17, 1911.

In

Atlantic Coast Line R. R. Co. vs. Georgia, 234 U. S. 280, this court was asked to hold invalid a statute of the state of Georgia which prescribed headlights of certain character upon locomotives. The opposition to the statute rested upon the assertion that Congress had acted and the Act of February 17, 1911, "relating to locomotive boilers" was among the federal statutes relied upon. The court rejected the argument, holding that a headlight was no part of a locomotive boiler and that neither this Act nor any other safety appliance act of Congress related to or regulated locomotive headlights. Of course

the Act of March 4, 1915, had not then been passed and congressional action had not been extended to cover the "entire locomotive." As the court said:

> "It does not appear, however, either that Congress has acted or that the Commission, under the authority of Congress, had established any regulation so far as headlights are concerned."

The case of

Vandalia R. R. Co. vs. Indiana, 242 U. S. 254,

reached this court after the passage of the Act of March 4, 1915. It involved a headlight statute of Indiana similar to the Georgia act passed on in *Atlantic Coast Line vs. Georgia*, supra. It differed from the *Georgia Case* only in that after the decision and judgment of the State Supreme Court upholding the validity of the Indiana law the Act of March 4, 1915, extending the provisions of the original Boiler Act had been passed. It was said that this distinguished the case from the *Georgia Case* and took it out of the controlling ruling there made. This position was held to be untenable, the court saying:

> "...the decision of the Supreme Court of Indiana, refusing an injunction to restrain the enforcement of the state commission's order, was rendered and judgment entered before the passage by Congress of the act referred to. Obviously, we cannot say that by that decision and judgment any right of plaintiff in error under a law of the United States was infringed, within the meaning of Section 237, Jud. Code, when the law creating the supposed right was not enacted until after the judgment."

But the court very clearly intimated that the rule would be different if the validity of the state statute respecting locomotive headlights was challenged after the passage of the 1915 Act of Congress extending its jurisdiction over the entire locomotive and all its appurtenances. For it was said:

"If, however, by virtue of the Act of 1915, or of any action heretofore or hereafter taken by the Interstate Commerce Commission under it, plaintiff in error is entitled to an injunction against the further enforcement of the order of the state commission, that right may be asserted in another action and will not be prejudiced by our present decision."

THE ALABAMA DECISION

Another "locomotive headlight case" reached the Supreme Court of Alabama and the decision of that court in

Louisville & Nashville R. R. Co. vs. State, 16 Ala. App., 199; 76 So. 505,

will be found well reasoned and illuminating. The question was the validity of an Alabama statute prescribing a designated character of locomotive headlight. The state act was attacked on the ground that Congress had exercised its exclusive power over the subject by the Act of 1911 and the amendment of March 4, 1915, and that the state law had been superseded. As a matter of special importance it should be noted that while the litigation over the validity of the Alabama law arose after the 1915 amendment, no regulation or order respecting locomotive headlights had been promulgated by the Commission under authority of the amendment. The case stood, therefore, as one involving the question as to whether by the amendment alone, unfortified by regulation, rule or order, Congress had so evidenced its intention to occupy the field as to destroy all state legislation on the subject. In a strong and convincing opinion the Alabama Supreme Court holds the state law to be nugatory, concluding with these words:

"When the amendatory act of Congress approved March 4, 1915, is read in connection with the Safe Locomotive

Boilers Act of February 17, 1911, we cannot escape the conclusion that the intention of Congress is plain that the states must be excluded from the right to legislate within the field to which the several original acts, and the amendatory act, extended the federal authority. It is immaterial that the final rules on the subject of headlights to be used on such locomotives were not promulgated by the Interstate Commerce Commission until, respectively, June 6, and December 26, 1916, after the commission of the alleged offense for which the prosecution was had.

"We are of the opinion that the act of the Alabama Legislature of July 17, 1915, is contrary to the expressed purpose and scope of the amendatory act of Congress of March 4, 1915, and that as to engines engaged in interstate commerce it has no application."

CONCLUSION

Extending, as they do, the authority of Congress over the entire locomotive and all its appurtenances, the amendments of 1915 and 1924, evince the clear intention of Congress to take exclusive control of the subject matter. There is to be no longer a division of jurisdiction. State laws and policies must give way before the dominant authority of Congress.

If this, then, be the scope of the federal statutes, the Georgia Act requiring automatic fire box doors invades the field occupied by paramount legislation and it is thereby rendered illegal.

It is not sufficient answer to say that the absence of regulation by the Interstate Commerce Commission gives authority to the state to regulate until the Commission shall have spoken on the particular subject. It is enough that Congress has

acted. The states have been silenced. Failure of the Commission to regulate creates the presumption that no regulation is necessary. The silence of the Commission is itself a regulation which the states may not repeal.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1926, No. 87.
OCTOBER TERM, 1925, No. 386.

GEORGE M. NAPIER, Attorney General of Georgia,
Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellee.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA.

Reply Brief on Behalf of Appellee

ROBERT C. ALSTON,
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CASES CITED

	Pages of Brief.
Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521.	2
Chicago & N. W. Ry. Co. vs. Railroad Commission, 205 N. W. 932	10
Chicago & N. W. Ry. Co. v. Michigan Pub. Util. Com., 208 N. W. 62	10
Roberts' Federal Liabilities of Carriers, Vol. 1, Sec. 17	5
Southern Ry. v. Railroad Com. of Indiana, 236 U. S. 439	4
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REPLY BRIEF ON BEHALF OF APPELLEE.

Appellee respectfully requests permission of this Court to file this brief in reply to the briefs of appellant.

At page 4 of the original brief of appellant, statement is made as to the reasons assigned by appellee for its claim that the Act of the Georgia Legislature under review is null and void and amongst these reasons is that jurisdiction of the subject has been taken by Congress under the Acts known as the Federal Boiler Inspection Act and the Amendment thereto of

March 4, 1915. No reference is there made to the amendment of June 7, 1924, which amendment is set out with some particularity at page 6 of the record.

At pages 15 and 16 of appellant's original brief, the regulations of the Commission are referred to in order to establish the proposition that those regulations are in the nature of establishing "standards of safety." It is there claimed that "Wherever the regulation states that the boiler 'shall have' a particular appliance, it is plain that the item referred to is an indispensable part of or appurtenance to the boiler or locomotive and essential to safety in operation."

The regulations of the Commission which are referred to, are not a part of the record in this case. It is very difficult to understand how the appellant contends that the Legislature of the State of Georgia has the right to adopt an Act requiring installation of fire-box doors and still to hold that those things do not fall within the "standards of safety." It would appear that if the Legislature of Georgia has the power to adopt such an Act, it is because it undertakes to require a safety appliance. At page 17 it is argued that

> "The Commission has undoubtedly recognized this situation and has narrowed the use of the mandatory term 'shall have' to such items as are 'essential' to 'safety in operation' beyond debate."

There is no justification for this assumption, but if there were, the Commission has no right to narrow or otherwise change the scope of the Act.

At page 18, appellant cites the case of *Baltimore and O. R. Co. vs. Groeger*, 266 U. S., 521. It is difficult to understand just what comfort appellant can get out of this case, for the Court holds that under Section 2 of the Boiler Inspecion Act

"Defendant's duty to have the boiler in a safe condition to operate so that it could be used without unnecessary peril to its employees was absolute and continuing."

The Court was dealing with a case in which a homicide of an engineer had occurred from the explosion of a boiler. What was said as to the duty of the defendant as to the boiler applies to "the entire locomotive, boiler and tender and all parts thereof." Thus, under this decision the power of the Government is directly exercised by virtue of this Act over the entire locomotive, boiler and tender and all parts and appurtenances thereof. If the Federal power is thus exercised the State's power is at an end.

At page 22 of the brief, appellant again refers to an entirely different proceeding and to a hearing before the Interstate Commerce Commission as to the operation of bell ringers. No part of this proceeding is in this record; but no part of the brief there referred to appears to deal with anything involved in this case, for we are not dealing with how a fire-box door shall be operated, if it be installed, but we are dealing with the question as to whether the subject of installation of fire-box doors has been so taken over by the Federal Government as to be without the power of the State Government. The argument at this part of the brief not only goes out of the record to find facts not within the record, but drops into things which are absolutely irrelevant.

At page 24 of appellant's brief, it is stated:

"The mere grant of power to Congress does not exclude the States."

That may or may not be true. It certainly is not always true. Appellant at the same point said:

> "The exercise of the power by Congress, however, is paramount, to the exclusion of the states, and any and all state statutes in conflict with the Federal regulations are rendered inoperative and void."

Conflict with the Federal statute or regulation is not an element essential to the invalidity of State action. State action cannot complement Federal action.

> "The test, however, is not whether the State legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exclusive control."
>
> *Southern Ry. vs. Railroad Commission of Indiana*, 236 U. S., 439, 448.

This was a safety appliance case.

At page 25 of appellant's brief, the statement is reiterated and carried a step further, for it is there said:

> "Federal statutes, however, are strictly construed and state regulations are valid unless they are repugnant to or in conflict with the Federal regulations or Congress has clearly manifested an intention to fully occupy the field."

Why should the Federal statutes on this subject be "strictly construed?" What authority is there for that?

At page 26, appellant quotes from the opinion of this Court in the Indiana Headlight case, 242 U. S., 255, in part as follows:

> "The amendment of 1915 extends the provisions *respecting inspections*, etc., to the entire locomotive and its appurtenances."

From this it is argued that the Federal Act is an "inspection" law. Under the Boiler Inspection Act the right of inspection extends not only to the Boiler but to the entire locomotive. The inspection is not for purposes of parade or ornament. It is for the purpose of seeing that all parts of the locomotive, boiler, tender and the appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. 2nd Section, Act of 1924.

At page 28, appellant cites Roberts' Federal Liabilities of Carriers, Volume 1, Section 17, underscoring these words:

> "If the State and the national law do not apply to the same subject matter, both are valid."

In the case at bar, the national law covers every part of the locomotive, its boiler, tender and all parts and appurtenances thereof. The fire-box door is intended to be attached to the boiler as a part thereof or as an appurtenance thereto, so they both cover the same subject matter. The object of the Federal law is to make and keep a locomotive, its boiler, tender and all parts and appurtenances thereof in proper condition and safe to operate. The Act of the Georgia Legislature has no ground for existence, except that it undertakes to accomplish the same purposes. On the same page, the appellant declares that the subject matter covered by the Boiler Inspection Act and its amendments "is to promote safety in operation by requiring adequate inspections."

He then argues (page 28) that there is nothing in the record to indicate that

> "The purpose of the automatic fire door provided for is to promote safety in operation. It is claimed that on the happening of certain contingencies, it

> tends to increase the safety of the engineer and fireman in the cab and may incidentally effect and increase safety in operation, but the real purpose is for the protection, health, comfort, convenience and general welfare of those engaged in firing and driving the locomotives."

We confess our inability to understand this argument. Under the statements made, why can it be thought that the two acts do not cover the same subject? The subject of the National Act is the locomotive, boiler, tender and all of its parts and appurtenances. The object to be accomplished through legislating on these subjects is the safety of employees and of the public, and to protect the health, comfort, convenience and general welfare of certain employees, and of the public. The record in the case shows (Record 20) that the witness Elliott introduced by appellant said that

> "Said door is a safety device," etc.

The same language is used by the witness Meredith (Record p. 21). This part of the brief seems to be contrary to the evidence offered by appellant in the Court below and contrary to law and reason.

At page 4 of reply brief of appellant, a distinction is drawn between the power of the Commission to "order" and its power to "require" certain equipment as the standard of safety. We do not understand that there is a difference in a decree of a governmental body which "orders" and one which "requires" that a certain thing be done. If there be some shadowy distinction in the meaning of these two words, there is no practical distinction when they are used in connection with this Act. If the locomotive is used in circumstances which make it out of order and not in proper condition and safe to operate, the act of the carrier is unlawful.

The duties of the inspectors are set out in a good deal of detail in the original Act of 1911. For instance, each inspector must make personal inspection of the locomotives under his care. He shall see that the carriers make inspections in accordance with the rules and regulations established by the Commission, and that carriers repair the defects which such inspections disclose before the locomotive can be again put in service. If a common carrier violates the Act or any rule or regulation made under its provisions, or any lawful order of any inspector, it is subject to punishment provided in Section 9 of the Act of 1911. So it would appear that, to try to distinguish between the effect of the power of the Commission to *order* and its power to *require*, can produce no practical result.

At page 6 of the reply brief, it is asserted:

> "An automatic fire door is not a safety appliance but is a protective device."

We submit that no practical distinction exists between a "safety appliance" and a "protective device." We presume that this language is used for the purpose of carrying forward the argument that the Georgia Act and the Federal Act deal with two different subject matters. A fire-box door is of course an appurtenance to the boiler to which it is attached. The fire-box is used for heating the boiler. The boiler is a part of the locomotive, and if this be true, jurisdiction over the subject has been taken by the Federal Government.

Apparently, appellant's thought is that if the State undertakes to legislate over the fire-box door because it is a protective device and the Federal Government undertakes to legislate about it because it is a safety appliance, there is no conflict; but the brief seems to destroy itself even in its own

field, for it proceeds to state that it (the fire-box door) may incidentally promote safety after emergency has risen.

In the last analysis, appellant has thus placed his case upon two propositions: the one is that there is a distinction between the power of the Commission to order and its power to require; the other is that there is a distinction between a safety appliance and a protective device. We cannot understand these distinctions, but if there are distinctions, in what way does that destroy the jurisdiction which the Federal Government had undertaken to exercise over the locomotive, its boiler, tender and all parts thereof and appurtenances thereto? It had the right to exercise that jurisdiction on the ground that Congress desired either a protective device or a safety appliance.

Appellant again apparently proceeds on the theory that jurisdiction of the Federal Government is dependent upon action of the Commission. We assert that the contrary is true. The Boiler Inspection Act by its own terms makes it unlawful for a carrier by railroad to use or to permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, etc. Certain methods of ascertaining safety are provided for and certain methods of enforcing this law are set up, but the thing that is enforced is the Act. It would be unlawful for a carrier by railroad to operate an unsafe locomotive if there were no rules or regulations of the Commission.

It appears from the record (page 21) that a good many fire-box doors have been installed on one of the divisions of the Southern Railway. It is pleaded by the defendant that a good many fire-box doors are in service (R. 13). It is

pleaded by the defendant that attention of the Commission has been called to the use of fire-box doors by the Chief Inspector (R. 12 and 13). The Commission may very well feel that this subject is solving itself without its orders, and that there are other things which should require the attention of the Railroads as to the safety of the public and of its employees, which are of greater moment than fire-box doors. It is made clear by the record that the failure of the Commission to act on this subject is not because the subject has not been brought to its attention—it is shown by the record that the subject has been a matter of consideration by the Commission—and certainly this is a perfect proof that silence is, itself, regulation; but, as pointed out above, the jurisdiction of the Federal Government is exercised over this subject directly through its Congressional enactment.

Under Section 5 of the original Act, each carrier subject to the Act is required to file rules and instructions for the inspection of locomotive boilers. If these rules are not filed, the chief inspector is required to prepare rules and instructions not inconsistent with the Act, so that there are, at all times, standards for the condition of the locomotive, boiler, tender and all its parts. Besides, under Section 6 of the Act, each inspector is required to exercise a very definite jurisdiction over each locomotive ordinarily housed or repaired in his district. He is required to see that the carriers make inspection in accordance with the rules and regulations established or approved by the Commission and that the carriers repair the defects which such inspections disclose before the boiler, or boilers, or appurtenances pertaining thereto, are again put in service.

No doubt the words "boiler or boilers or appurtenances pertaining thereto," since the Acts of 1915 and 1924, mean "the locomotive, its boiler, tender and all parts and appurtenances."

Appellant refers to the case of *Chicago & Northwestern Railway Company vs. Railroad Commission*, 205 N. W., 932, from the Supreme Court of Wisconsin. This case is now before this Honorable Court on an appeal on writ of error. The Wisconsin Court undertook to draw a distinction between the exercise of jurisdiction in order to make the locomotive safe, and the exercise of jurisdiction for the purpose of preserving health, the Court saying:

> "However, the public health and public safety afford two distinct fields of legislation."

Page 934.

The position seems to be entirely too narrow and to be taken on an erroneous conception. The question is, has Congress taken jurisdiction? It is not what caused Congress to take jurisdiction. If the jurisdiction exists, it makes no difference what was the motive that moved Congress to exercise it; but that can have no application to the case at bar for the reason that there can be no doubt that what is here concerned is the safety of the public and of employees. It can make no difference in results whether the fire-box door is a "safety appliance" or "a protective device."

The case of *Chicago and Northwestern Railway Company vs. Michigan Public Utilities Commission*, 208 N. W., 62, from the Supreme Court of Michigan, involves very much the same question as in the case from Wisconsin, 205 N. W., 932. The decision of the lower court was affirmed by an evenly divided Court. The opinion written by Mr. Justice Steere concurred in by the Chief Justice and two other justices, does not follow the Wisconsin case. It approves the decision of the District Court for the Northern District of Georgia in the case at bar. The opinion of the other justices who were not for affirmance, undertaking to draw a dis-

tinction between health and safety, apparently falls into the line of reasoning of the Wisconsin case. For the reasons stated as to the Wisconsin case, the opinion of the justices in the Michigan case who were for affirmance, cannot apply to the case now involved, even if the opinion were correct.

The distinction which is made in the Wisconsin case and that which is undertaken to be made by four of the justices in the Michigan case, as between safety and health, appear to overlook the provisions of Section 2 of the Boiler Act, which make it unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof *are in proper condition* and safe to operate in the service to which the same are put.

The condition must be such that it can be used in the service without unnecessary "*peril to life or limb.*" The thought in the decisions under consideration appears to have been that the Federal Government has taken jurisdiction over the things which make for violent injury, such as being burned from escaping fire or scalded from escaping steam; but that it had not taken jurisdiction over those things which would put the engine out of "proper condition" because of cold. In other words, the Federal Government had taken jurisdiction over the condition of the engine as far as it is affected by heat, but not as it is affected by cold. If the engine is in such status that the water gauge might explode and injure the hand or eye of an engineer, jurisdiction of the Federal Government exists; but if it is in such condition that undue cold can come in and injure the engineer's lungs, the Federal Government had exerted no jurisdiction. If the "peril to life" of the engineer is caused because the engine is in an improper mechanical condition, the Federal Government has occupied the field; but if the peril to the engineer's life comes from an

improper condition which let in too much cold air, the Federal Government has taken no jurisdiction. The distinction is too close for practical use. The Federal Government has taken that jurisdiction over the "condition" of the engine which is sufficient to require that the engine (meaning the locomotive, boiler, tender and its appurtenances) be employed in the active service of the carrier without unnecessary "peril to life or limb." It makes no difference whether that which produces the imperilling condition is due to heat or cold, to mechanical or other circumstances. The decisions in Wisconsin and the Michigan cases should, we respectfully submit, be reversed.

But it makes no difference, as far as the case at bar is concerned, for, under the principles announced in those decisions, the present case should, we respectfully submit, be affirmed.

It is plainly right that there should be but one governmental jurisdiction exercised over a locomotive in determining whether it is in proper condition to operate. That jurisdiction has been exercised by Congress and the States have been excluded from the field.

Respectfully submitted,

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